Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Petition for Declaratory	)	
Ruling to Declare Unlawful	)	CC Docket No. 98-62
Certain RFP Practices	)	
by Ameritech	)	
	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Pursuant to the Public Notice released May 5, 1998, in this proceeding (DA 98-849), the Association for Local Telecommunications Services ("ALTS") hereby supports the Petition for Declaratory Ruling to Declare Unlawful Certain RFP Practices by Ameritech filed by Sprint on April 28, 1998.

ARGUMENT

I. AN RBOC'S JOINT MARKETING WITH AN IN-REGION NON-AFFILIATE IXC IS PROHIBITED BY SECTION 271 AND SECTION 251(g).

Sprint is asking the Commission to declare that Ameritech's "teaming" arrangements issued on March 2, 1998, violate section 271 and 251(g). According to Sprint, they violate section 271 because Ameritech would be involved in the marketing of in-region long distances services, a practice long prohibited under the MFJ, and they would violate section 251(g) because Ameritech would be making the selection of the long distance carrier under the teaming arrangements (Sprint Petition at 1).

If Sprint's assertions are correct, then Ameritech's March 2d teaming arrangements clearly violate these core provisions of the 1996. As the Commission is aware, both Ameritech and US WEST are currently engaged in joint marketing arrangements with Qwest. AT&T and MCI, joined by ALTS and various of its members, have sought injunctions against these arrangements from federal district courts in Seattle and Chicago.[1] Because the precedents and policies which control the current request by Sprint are set out in plaintiffs' memoranda in these proceedings, ALTS hereby appends the memorandum in support of plaintiffs' request for an injunction as filed in the Seattle litigation (Attachment A).

II. THE COMMISSION'S AMICUS MEMORANDUM IN THE QWEST LITIGATION UNDERSCORES THE MERIT OF SPRINT'S PETITION.

On May 29, 1998, the Commission moved for leave to participate as an amicus in the Seattle litigation, and filed a memorandum in support of its motion that is pertinent to the Sprint petition. According to the Commission's attorneys (Memorandum at 8):

> " ... while the Commission has not yet had occasion to address these types of agreements, AT&T's filing before the court raises substantial legal issues that warrant the Commission's attention before these agreements become the norm throughout the country. In particular, there are serious questions as to whether the terms of U S WEST's agreement with Qwest in effect makes US WEST a provider of

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[1] AT&T Corp. et al. v. Ameritech Corporation, N. 98 C 2993 N.D. Ill); AT&T Corp. et al. v. U S WEST Communications, Inc., No. C98-634 WD (W.D. Wash.).

> long distance service in violations of section 271. 47 U.S.C. § 271. There is also a significant issue as to whether the US WEST-Qwest agreement is consistent with US WEST's responsibility to provide equal access to its facilities to all long distance carriers, as that responsibility has been interpreted by both the Commission and the MFJ court."

Significantly, the Commission's attorneys also took issue with US WEST's characterizations of the Commission's orders in Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, 11 FCC Rcd 21905 (1997), in Application of BellSouth Corporation, 13 FCC Rcd 537 1997), and in Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 12 FCC Rcd 3824 (1997).

Similarly, the Washington Utilities and Transportation Commission ("WUTC") in its own amicus submission in Seattle asserted that US WEST's joint marketing:

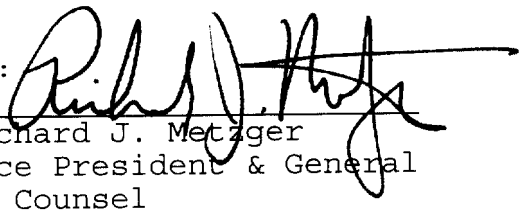
> "violated the letter and the spirit of the Federal Telecommunications Act of 1996, particularly sections 251(g) and 271, ... would delay the implementation of federal state policies promoting competition in the local telecommunications market, and would inject US WEST into the role of controlling various aspects of long distance service."

Based on the statements of the Commission's attorneys, the WUTC, and the precedents set forth in the attached memoranda, Ameritech's teaming guidelines plainly violate sections 271 and 251(g) if they, in fact, operate in the fashion Sprint describes.

CONCLUSION

For the foregoing reasons, Sprint's petition for a declaratory ruling to declare unlawful certain RFP practices by Ameritech should be granted.

Respectfully submitted,

By: 

Richard J. Metzger
Vice President & General Counsel
Association for Local Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006
(202) 969-2583

June 4, 1998

ATTACHMENT A

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT&T CORP., MCI TELECOMMUNICATIONS CORPORATION, ASSOCIATION FOR LOCAL TELE-COMMUNICATIONS SERVICES, McLEODUSA TELECOMMUNICATIONS SERVICES, INC., ICG COMMUNICATIONS, INC. GST TELECOM, INC. PLAINTIFFS vs. U S WEST COMMUNICATIONS, INC., DEFENDANT	C. A. No. _____ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, PRELIMINARY INJUNCTION ON AN EXPEDITED BASIS**

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

Plaintiff AT&T Corp. ("AT&T")[1] respectfully submits this Memorandum of Points and Authorities in Support of AT&T's Motion for Temporary Restraining Order or, in the Alternative, Preliminary Injunction on an Expedited Basis.

INTRODUCTION AND BACKGROUND

Defendant U S WEST Communications, Inc., ("U S WEST") is a Bell Operating Company that has a monopoly over local telephone service in major portions of 14 States. On Monday of this week, it began implementing an "alliance" with Qwest Communications International, Inc. ("Qwest"), under which U S WEST will endorse and market Qwest's long distance service to its monopoly customer base as part of a combined package with U S WEST's monopoly local service. In return, Qwest will make a payment to U S WEST of an undisclosed amount for each customer U S WEST signs up for this package, as well as providing U S WEST with undisclosed additional compensation for other aspects of their relationship.

This arrangement is patently forbidden by two provisions of the Communications Act that were enacted by Congress in 1996 in order to codify the core of the antitrust decree that broke up the former Bell System ("Modification of Final Judgment" or "MFJ"). These provisions (1) prohibit U S WEST and other BOCs from "providing" long distance service while they have local monopolies, and (2) require U S WEST and other BOCs to provide "equal access" to all long distance carriers and

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[1] MCI Telecommunications Corp. ("MCI"), the Association for Local Telecommunications Services ("ALTS"), McLeodUSA Telecommunications Services, Inc. ("McLeod"), ICG Communications, Inc. ("ICG"), and GST Telecom, Inc. ("GST") hereby join and support this memorandum of points and authorities.

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

prohibit preferential treatment of any carrier. Numerous judicial decisions squarely establish that the marketing of another carrier's long distance service both constitutes the unlawful "provision" of long distance service by the BOC and a violation of the separate equal access and nondiscrimination requirements. Industry analysts have therefore aptly described U S WEST's posture as "Stop us if you can." See "U S WEST Deal Called Test Of '96 Law," Washington Post, p. D3 (May 8, 1998) (attached hereto as Exh. 2).

Indeed, the provisions enacted by the Telecommunications Act of 1996 ("1996 Act") are explicit that the BOCs will be permitted to enter the long distance market only after first demonstrating that they have implemented a 14-point "competitive checklist" designed to open their monopoly local markets to competition and have satisfied other statutory requirements. See 47 U.S.C. § 271. In announcing this end-run around the requirements of the Act, however, U S WEST stated that it found the requirement that it first open its monopoly markets "cumbersome" and "frustrat[ing]." See "U S WEST Strikes Marketing Alliance With Qwest In Bold Move Skirting Rules," Wall Street Journal, p. A2 (May 7, 1998) (attached hereto as Exh. 3).

If permitted to proceed, this arrangement will cause substantial and irreparable harm to long distance carriers (like AT&T and MCI), to carriers seeking to enter the local market (like McLeod, ICG, and GST), and to the public interest as defined in the 1996 Act. The basis for the 1996 Act, as with the antitrust decree that preceded it, is that a BOC that is permitted to provide long distance service while its local monopoly remains intact will "ineluctably leverage" that

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

monopoly to give immense, artificial advantages to the long distance carriers in which the BOC has a direct financial interest. United States v. Western Electric Co., 969 F.2d 1231, 1238 (D.C. Cir. 1992).

Qwest's own predictions vividly illustrate the point. While Qwest has been able to attract only a minute fraction of the long distance market when it competes on a level playing field, Qwest has "conservative[ly]" projected that it will obtain $100-$200 million in additional revenue in the first year as a result of this alliance, and that between 25 percent and 35 percent of customers in U S WEST's region could eventually purchase such a package. Affidavit of John A. McMaster ("McMaster Aff.") ¶ 27 (attached hereto as Exh. 1). These massive projected shifts will result not from any innovative new service, technological breakthrough, superior efficiency, or dramatically lower price on Qwest's part, but merely from the local monopolist's endorsement of its long distance services and its preferential access to U S WEST's distribution channels and monopoly services.

In order to place these issues in context, it is necessary to describe (1) the MFJ and its interexchange restriction and equal access requirements, (2) the 1996 Telecommunications Act that codified those requirements, and (3) the U S WEST/Qwest arrangement that violates those requirements.

1. The MFJ

U S WEST is one of the Bell Operating Companies ("BOCs") that was divested from AT&T under the 1982 antitrust decree ("MFJ") that broke up the former Bell System. United States v. AT&T, 552 F. Supp. 131

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Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

(D.D.C. 1982), aff'd sub. nom, Maryland v. United States, 460 U.S. 1003 (1983). U S WEST serves major portions of 14 States in the western United States -- including all the major metropolitan areas -- and it is the monopoly provider of local telephone service in those areas.

Carriers like AT&T and other carriers that provide long distance service (also referred to as "interexchange" service or "interLATA" service) are critically dependent on U S WEST and other local telephone monopolies in two basic respects. First, virtually every long distance call originates and terminates on their local facilities. A call from Minneapolis to Seattle, for example, travels first over U S WEST's monopoly local network in Minneapolis, is then transferred by U S WEST to the caller's chosen long distance carrier, and that long distance carrier then transfers the call to U S WEST's monopoly facilities in Seattle where it is in turn transmitted to the party being called. These services that local telephone companies provide to long distance carriers at the originating and terminating ends of a long distance call are called "access services," and BOCs' "access charges" for these services represent nearly 40 percent of the cost of long distance calls. See McMaster Aff. ¶¶ 6-7.

Second, the overwhelming majority of customers will first subscribe to the long distance service of a particular long distance carrier through their local telephone company when they call to order local exchange service. When a customer selects or changes a long distance carrier, the local telephone company must also send software instructions to its switch so that the customer's long distance calls

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

will thereafter be transmitted to the appropriate long distance carrier's network. Long distance carriers are therefore dependent on local telephone companies like U S WEST neutrally to inform the customer of his or her long distance options and to receive and process the customer's selection accurately. Id. ¶ 8.

By contrast, if a BOC had a direct financial stake in one long distance carrier, every contact with customers that wish to order local service (or that have any question about their service) would enable the BOC to recommend, urge, or even pressure customers to subscribe to the long distance service in which the BOC has an interest.

Until the implementation of the MFJ, the BOCs themselves provided long distance services both directly and through their contractual relationship with AT&T's Long Lines Division. The combined Bell System had a monopoly not only over local services but also over the long distance services because the Bell System's long distance operations had more favorable access to the BOCs' monopoly facilities (and information about them) than any other firm could obtain. That enabled the BOCs and AT&T to provide higher quality long distance service at lower cost than any potential rival, and to exploit unparalleled information about, and marketing channels to, the BOCs' captive local customers. McMaster Aff. ¶ 12-13.

This discrimination imposed massive, and competitively insurmountable, additional costs upon AT&T's potential competitors such as MCI. In addition to the direct costs imposed by inferior access, the fact that the BOCs had an unmistakable incentive and

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Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

ability to engage in a range of both obvious and subtle acts of discrimination required potential rivals, as well as the Federal Communications Commission ("FCC") and the Department of Justice, to engage in constant and expensive efforts to monitor the BOCs' conduct and attempt to enforce the laws and regulations against anticompetitive practices. In that regard, at the time of the United States' antitrust suit, more than 70 private antitrust suits had also been filed against the Bell System. McMaster Aff. ¶¶ 12-13.

In the United States' antitrust suit, the United States submitted evidence that the BOCs had impeded long distance competition by denying the Bell System's long distance competitors access to the essential facilities that they controlled and to information about those facilities at the same terms and price that the Bell System's long distance operation enjoyed. More fundamentally, the United States submitted evidence that the BOCs' simultaneous provision of local and long distance service would be inherently anticompetitive -- and would increase the costs of and irreparably harm competing carriers -- irrespective of whether BOCs ever could be proven actually to have engaged in actual discrimination. In particular, the United States showed that the engineering and operation of local networks were so complex and dynamic, and so dependent on subjective judgments of the persons who manage them, that anticompetitive abuses of local monopolies could never be adequately remedied, much less deterred, by after-the-fact antitrust remedies if a BOC had a direct financial stake in any long distance carrier, and that the combination of a BOC's local monopolies and competitive long distance service would,

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

in all events, cause competitors to incur costs of monitoring BOC behavior that the BOCs' long distance arm would not incur. The United States contended that, to create more certain prospects for competition in long distance and other related markets, the bottleneck local monopolies of the BOCs must be divested from AT&T, and these divested BOCs must be prohibited from participating in those competitive markets so long as their local exchanges remained monopolies. McMaster Aff. ¶¶ 13-15.[2]

This lawsuit was settled in 1982 through entry of the MFJ, which gave the United States the precise relief it sought. Id. As the D.C. Circuit has stated, "the premise" of the MFJ was that so long as the BOCs "enjoyed a monopoly on local calls," they "would ineluctably leverage that bottleneck control in the interexchange (long distance) market" and harm interexchange competition and consumers. See United States v. Western Elec. Co., 969 F.2d 1231, 1238 (D.C. Cir. 1992). While the MFJ did not seek to eliminate the BOCs' local monopolies, and therefore could not eliminate their ability to impede competition, it rested on the conclusion that they would have no incentive to use their local monopolies to impede long distance competition if they could not have a financial interest in the success of any particular long distance carrier.

Section II(D)(1) of the MFJ therefore prohibited the divested BOCs and any BOC affiliates from "provid[ing] interexchange

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[2] See United States v. American Tel. & Tel. Co., 524 F. Supp. 1336 (D.D.C. 1981); Plaintiff's Memorandum In Opposition to Defendants' Motion For Involuntary Dismissal Under Rule 41(b) (August 16, 1981); United States v. AT&T, 552 F. Supp. at 131. 160--65 (D.D.C. 1982).

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

telecommunications services." See United States v. Western Elec. Co., 552 F. Supp. 131, 227 (D.D.C. 1982). In subsequent decisions under the MFJ, the Court made clear that "the term 'provide' or 'provision' [in the MFJ] was to be synonymous with furnishing, marketing, or selling," United States v. Western Elec. Co., 675 F. Supp. 655, 666 & n.46 (D.D.C. 1987). See also United States v. Western Elec. Co., 627 F. Supp. 1090, 1099-1103 (D.D.C. 1986) (same). Under Section VIII(C) of the MFJ, this interexchange restriction was to remain in effect unless and until a BOC could show that there was no longer even a "substantial possibility" that it "could use its monopoly power to impede competition" in the long distance market. Western Elec., 552 F. Supp. at 231. Under this standard, courts repeatedly refused to authorize BOCs to provide even long distance services that were incidental to other authorized BOC services.

In addition, Sections II(A) and II(B) of the MFJ required the BOCs to provide "equal access" to all long distance carriers and prohibited any favoritism to any one carrier or group of carriers. See id. at 227. These requirements applied to, among other things, any contacts between BOCs and their customers regarding the selection of long distance carriers. See United States v. Western Elec. Co., 578 F. Supp. 668, 676-77 (D.D.C. 1983). Thus, for example, when a new customer called U S WEST to order service, the MFJ required it to provide a list of available long distance carriers in random order, and not to urge the customer to choose any particular carrier.[3] That

[3] See id.; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd. 21905, 22046 (1996) ("Non-Accounting Safeguards") (describing MFJ's requirements).

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

is the "carrier selection" process that has been followed by U S WEST and the other BOCs from the time of the MFJ's implementation, until U S WEST began this week to implement its arrangement with Qwest.

In the years following the entry of the MFJ, the long distance market became vigorously competitive. Prices declined more than 50 percent, and hundreds of new long distance carriers have successfully entered as a result of the competitive opportunities the MFJ established.

2. The 1996 Act

The Telecommunications Act of 1996 was signed into law on February 8, 1996. Its purpose is to promote competition in monopoly local and other telecommunications markets. To that end, it amends the Communications Act of 1934 ("1934 Act") to add provisions that preempt all state laws that have the effect of preventing any carrier from providing a telecommunications service, and that establish new affirmative obligations on incumbent local exchange carriers to open their markets to competition by granting competitors nondiscriminatory and cost-based access to their monopoly facilities and services in order to provide competing local services. See 47 U.S.C. §§ 251-253.

The 1996 Act also supersedes the MFJ. Section 601(a)(1) provided that parties to the MFJ would henceforth be subject to the "restrictions and obligations" of the 1934 Act, as amended, instead of to those of the MFJ. See Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 143 (1995). The 1996 Act further amends the 1934 Act by, inter alia, adding Sections 251(g) and 271, 47 U.S.C. §§ 251(g) and 271, to

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

codify the core equal access requirements and the interexchange restriction of the MFJ, and to establish the mechanisms by which these duties and prohibitions may be modified or lifted.

Specifically, Section 251(g) provides that the equal access obligations of the MFJ (and other antitrust consent decrees) shall continue to apply to the parties to those decrees "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [Federal Communications] Commission." The FCC has issued no such regulations.

Section 271 codifies the core of the MFJ's interexchange restriction, while simultaneously authorizing specific services that had been barred by the MFJ's terms and the judicial decisions under it. First, Section 271(a) provides that a BOC may not "provide interLATA services except as provided in this section." Second, Section 271 establishes three sets of express statutory exceptions to that general restriction. Section 271(b)(2) authorizes a BOC to provide interLATA services originating outside the states in the BOC's region, thereby overruling United States v. Western Electric Co., 673 F. Supp. 525, 543-45 (D.D.C. 1987). Sections 271(b)(3) and (g) authorize specified "incidental" interLATA services within a BOC's region -- e.g., long distance services that are provided to cellular customers or are used to access information services or transport network signaling (overruling id. at 550-52; United States v. Western Electric Co., 907 F.2d 30 (D.C. Cir. 1990); id., 969 F.2d 1231 (D.C. Cir. 1992)). Further, Section 271(f) authorizes those services for which the MFJ interexchange restriction had been waived by the Court

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

as of the date the Act was signed into law.

Section 271 also sets forth the standards and procedures that will govern any request to remove the remaining core of the long distance restriction as it applies to any particular BOC in a particular State. Such removal is conditioned on the BOC making a showing to the FCC that it has satisfied statutory requirements in that state. In particular, U S WEST and other BOCs may not begin to provide general in-region interLATA services in any state unless and until the FCC finds U S WEST: (1) has implemented a 14-point "competitive checklist" of measures that assure that new entrants can effectively offer competing local services (Sections 271 (c)(2)(A) & (B)); (2) faces a facilities-based local service competitor that is offering local service to customers in that state (or finds that all potential such providers have failed to request or timely to implement interconnection with U S WEST) (Section 271(c)(1)); (3) would comport with the separate affiliate and nondiscrimination requirements of Section 272 (Section 271(b)(1) & (d)); and (4) through its long distance authority would not subvert "the public interest" (Section 271(d)(3)).

U S WEST has not applied to the FCC under Section 271 for any of its States. Nor has it taken the steps that are required by Section 251 and by the competitive checklist to open its markets to competition, and it therefore retains monopoly control of the local exchange market. McMaster Aff. ¶ 21. Indeed, its recalcitrance has led to fines and orders to show cause from State public utility commissions within its region. Id. ¶ 21 & n.4. For all these

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

reasons, the long distance restriction of Section 271(a) continues to apply to U S WEST.

3. The U S WEST/Qwest Arrangement.

Declaring that the market-opening requirements of Section 271 are "cumbersome" and "frustrat[ing]," on Wednesday, May 6, the President of U S WEST Communications Group unveiled a local and long distance marketing alliance -- called the "Buyer's Advantage Program" -- with Qwest, a long distance carrier.[4] Under the Buyer's Advantage Program, U S WEST will abandon neutrality in its descriptions of long distance carriers to local customers. Instead, it will explicitly endorse and promote Qwest's services over those of other long distance carriers and will further allow Qwest to participate in service arrangements that U S WEST denied to competing long distance carriers. Specifically, through both inbound telemarketing (when customers contact U S WEST) and outbound telemarketing (when U S WEST contacts customers), U S WEST will inform customers that they can receive Qwest long distance service in conjunction with U S WEST local service and will recommend and urge that they do so.

Qwest will compensate U S West "largely" on a per-customer basis.[5] U S WEST will thus earn a specific amount for each customer it persuades to subscribe to Qwest's service, plus additional undisclosed compensation -- thus giving it a direct financial interest

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[4] U S WEST had previously argued to a federal district court that Section 271 is an unconstitutional bill of attainder. See SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997). That judgment has been stayed pending appeal.

[5] See http: //www.uswest.com/com/insideusw/policy/docs/buyers_advantage2.html "U S WEST Public Policy Web Page")(attached hereto as Exh. 4).

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

in Qwest's success. Qwest has stated that it was selected as the Buyer's Advantage partner over other carriers that competed for the position. McMaster Aff., ¶ 23.

The press has characterized this alliance as an effort to "sidestep" federal law restrictions and as a "test" of the 1996 Act.[6] On the same day that the arrangement was announced, U S WEST took the unusual step of posting on its web site a four-page legal defense of its actions prepared by its outside law firm. See U S WEST Public Policy Web Page. For its part, Qwest has predicted an extraordinarily dramatic marketplace shift within U S WEST's 14-state region as a result of this alliance. Qwest's CEO has stated that he expects 25-35 percent of customers to purchase such a package, and has "conservatively" projected the alliance will provide $100 to $200 million in additional revenue for Qwest in the first year alone.[7] Qwest has further stated that it believes that the arrangements will reduce "churn" within its customer base -- that is, those customers that it obtains through U S WEST will be less likely to switch to other long distance carriers. See McMaster Aff. ¶ 29.

U S WEST has stated that the same arrangement will be available to any long distance carrier that meets undisclosed terms and conditions and charges the same or a lower price than the $.10 per

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[6] See "U S WEST Strikes Marketing Alliance with Qwest in Bold Move Skirting Rules," Wall Street Journal, supra, p. A2 (Exh. 3)("U S WEST . . . boldly side-stepping restrictions on a Bell's entry into the long distance phone business, . . .); "U S WEST Deal Called Test of '96 Law,'" Washington Post, supra, p. D3 (Exh. 2) (U S WEST "has come up with a creative way to sidestep tough federal hurdles barring [it] from the long distance business").

[7] Qwest Press Conference Transcript, p. 3 (May 7, 1998) (statement of Qwest President and CEO Joseph P. Nacchio)(attached hereto as Exh. 5).

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

minute that Qwest will charge for all calls placed by customers that U S WEST signs up for it. See id. ¶ 24. U S WEST is thus unwilling to endorse and affirmatively to market higher quality services that other long distance carriers offer at appropriately higher prices than Qwest's. Further, U S WEST's purported offer to provide the same marketing for other long distance carriers itself is meaningless because (1) the terms and conditions are not disclosed, (2) effective inbound and outbound telemarketing could not be provided if U S WEST were marketing multiple long distance carriers, and (3) this offer was not made until a few days before the arrangement with Qwest began, thereby guaranteeing (as Qwest's CEO stated) that Qwest would have an enormous "first mover" advantage even if another long distance carrier could satisfy U S WEST's undisclosed terms.

On May 11, 1998, U S WEST began an aggressive marketing campaign of this "Buyers' Advantage Program" in six of its fourteen states. It is running television and newspaper advertisements promoting the program. It is urging any customers that contact U S WEST to order new services or to ask questions about existing service to subscribe to the service. U S WEST is further engaging in outbound telemarketing in which it calls local telephone subscribers and urges them to switch to the program. McMaster Aff., ¶ 21. U S West has stated that it will soon implement the alliance in its remaining states.

ARGUMENT

Under well-settled standards, a Court determining whether to grant a motion for preliminary injunction must consider whether the

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

plaintiff has established "either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." America West Airlines, Inc. v. National Mediation Bd., 976 F.2d 1252, 1259 (9th Cir. 1993)(citing Johnson Controls, Inc. v. Phoenix Control Sys., 886 F.2d 1173, 1774 (9th Cir. 1989))(internal quotations omitted). These factors are "viewed as a continuum," such that a strong showing on one factor may justify relief notwithstanding a less strong showing on others. Id. In this case, each factor strongly supports the issuance of a preliminary injunction. Moreover, a preliminary injunction would cause no undue harm to others and would serve the public interest.

I. THERE IS AN OVERWHELMING LIKELIHOOD THAT THE U S WEST/QWEST ARRANGEMENT WILL BE DECLARED UNLAWFUL.

Under the U S WEST/Qwest alliance, U S WEST is being paid to endorse Qwest's long distance service, to urge new or existing monopoly local customers to use or switch to Qwest from competing long distance services, and to offer Qwest's long distance service as part of a package with U S WEST's monopoly service. U S WEST concedes that this arrangement would have constituted a blatant violation of both the interexchange restriction and the equal access requirements of the MFJ. However, it contends that the alliance does not violate the provisions of the Communications Act -- Sections 271(a) and 251(g) -- that codify those core MFJ provisions.

A. U S WEST Is "Provid[ing] InterLATA Services" In Violation of Section 271(a).

Section 271 of the 1996 Act codifies the MFJ's prohibition on the

DAVIS WRIGHT TREMAINE LLP
Law Offices
2600 Century Square, 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 - Fax (206) 628-7699

provision by BOCs of interLATA services (§271(a)), while simultaneously establishing express exceptions for out-of-region and specified "incidental" long distance services that the MFJ court and the D.C. Circuit had held were prohibited by the MFJ (§§ 271(b)(1) & (2)). See supra pp. 11(citing cases). Under the MFJ, the arrangement between U S WEST and Qwest would have constituted the unlawful provision of interLATA services on two separate grounds that do not fall within any of Section 271's exceptions to the MFJ's ban.

First, the MFJ court squarely held that any arrangement in which a BOC marketed the service of select interexchange carriers in competition with other interexchange carriers violated the MFJ's restriction against "provid[ing]" interexchange services. See United States v. Western Elec. Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (Section II(D)(1)). The fundamental premise of U S WEST's defense of its arrangement with Qwest is that "[a] carrier 'provides' a service when it supplies or furnishes the service, by operating the necessary facilities or buying access to another carrier's network, not when it merely markets another's service."[8] But that premise was consistently rejected by the MFJ court. See, e.g., United States v. Western Elec. Co., 627 F. Supp. 1090, 1101-03 (D.D.C. 1990)("Shared Tenant Services"); United States v. Western Elec. Co., 675 F. Supp. 655, 666 & n.46 (D.D.C. 1987); United States v. AT&T, C.A. No. 82-0192, at 3 (D.D.C. filed Apr. 11, 1985) (unpublished order) (attached hereto as Exh. 6).

In 1987, for instance, the Court expressly discussed its

[8] See U S WEST Public Policy Web Page, p. 2 (Exh. 4).

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understanding of the importance of the terms "providing" and "provisioning" in its MFJ decree and explained its efforts to use the terms consistently. Western Elec. Co., 675 F. Supp. at 666. The Court examined the different contexts in which the terms are used in the decree, including Section II(D)(1)'s directive that "'no BOC shall . . . provide interexchange telecommunications services or information services,'" and the Court expressly held that "the term 'provide' or 'provision' was to be synonymous with furnishing, marketing, or selling." Id. at 666 & n.46 (emphasis added). Thus, under this definition, the marketing of a service in exchange for a fee would constitute providing that service even if the BOC did not physically transmit it.

This was also one of the several independent grounds on which the Court had previously held that it would violate the MFJ's interexchange restriction for a BOC to recommend to customers a particular long distance carrier as offering the lowest cost service. In Shared Tenant Services, supra, a BOC had proposed to offer a service to apartment buildings and other large facilities under which it would route calls to the long distance carrier that it had identified as the lowest cost provider. Id. at 1101 ("The [BOCs] expect to perform these functions by making selections of interexchange capacity on what they deem the lowest-cost basis and by marketing the services thus assembled"). The Court found that this endorsement and routing of calls, even apart from the BOC's purchase and resale of long distance service, violated the MFJ. It held that the "selection of carriers . . . constitute[s an] integral part[] of

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the interexchange business, and that, by performing these functions, the Regional Companies would be directly competing with the interexchange carriers for that business." Id. at 1102; see also id. at 1101 ("marketing" of other carriers' long-distance services would mean that the BOC would "be directly competing with the legitimate interexchange providers").

Similarly, in United States v. AT&T, supra, the Court was asked to determine whether one of the BOCs had violated the non-discrimination provisions of the MFJ when the BOC endorsed the services of an interexchange service reseller to which the BOC had sold some switching equipment. Civil Action No. 82-0192, at 1-2. The Court ruled that the BOC's "endorsement of quality" plainly violated the decree. Id. at 3. In fact, as the Court noted, the violation was so clear that no BOC participating in the proceedings even attempted to defend the endorsement. Id. at 3 n.4.

Moreover, although the marketing alone renders the alliance with Qwest unlawful, U S WEST has further aggravated the illegality of that arrangement by also dictating the pricing and service standards of the long distance offering it will market. U S WEST has agreed to give Qwest's service its corporate endorsement and is vouching for that service to its customers. U S WEST therefore states that Qwest has specified both its price and the "standards it will meet for provision of service and customer support," and U S WEST requires that any long distance carrier seeking a similar marketing arrangement with U S WEST must agree to "the same terms to which Qwest has agreed, or with lower long distance rates than Qwest is offering." U S WEST Public Policy

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Web Page, pp. 2, 3 (Exh. 4). U S WEST is thus not only marketing the offering, but designing it as well, and thus assuming a role prohibited under the MFJ of "arbiter of future interLATA services, . . . shap[ing] interLATA competition to suit its needs." United States v. Western Elec. Co., 583 F. Supp. 1257, 1259 (D.D.C. 1984).

Second, the MFJ barred any arrangement in which a BOC had a financial stake in the success of an individual long distance carrier, for the whole point of the ban on a BOC's provision of interexchange services was to assure the BOCs had no "incentive" to favor a particular interexchange carrier and to disadvantage its rivals. See United States v. Western Elec. Co., 552 F. Supp. 131, 160-65 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). An arrangement in which a BOC markets one carrier's long distance service in exchange for a payment for each customer that the BOC signs up epitomizes the relationships that create this illicit incentive and that thus constitutes the unlawful "provi[sion]" of long distance services. Indeed, in the Shared Tenant Services case the MFJ court struck down the "marketing [of] a telecommunication package that included interexchange services" in part because the BOC "would have a direct financial interest in ensuring that a particular mix of carriers -- those offered . . . in conjunction with the [BOC] -- was selected." 627 F. Supp. at 1100 n.39.

U S WEST's Public Policy Web Page does not deny that U S WEST's arrangement with Qwest would have been unlawful under the MFJ, that it would have constituted the forbidden "provi[sion] of interexchange

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services," or that it would create the precise incentive to discriminate in favor of one long distance carrier that the MFJ was designed to eliminate. It appears to contend, however, that the 1996 Act silently modified this aspect of the MFJ's interLATA restriction when it codified that restriction in Section 271(a). That contention is baseless.

It could not be clearer that Section 271(a), which prohibits any BOC from "provid[ing] interLATA services except as provided in this section" (47 U.S.C. § 271(a)), continues all of the interLATA prohibitions of the MFJ except where the Act itself (or a subsequent FCC order under § 271) permits BOCs to offer interLATA services. Congress used exactly the same word -- "provide" -- that the MFJ court construed and found so central to its decree and subsequent orders. Further, while Congress enacted express exceptions for out-of-region services, incidental services, and previously authorized services -- and thereby overruled a series of earlier judicial decisions under the MFJ -- Congress created no exception for marketing. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard v. Pons, 434 U.S. 575, 581 (1978). Moreover, "[t]hat presumption is particularly appropriate" where, as here, Congress has "exhibited both a detailed knowledge of the [MFJ's] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." Id. Further, the legislative history confirms

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